Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-702

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA, *Petitioner,*

v.

STATE OF NEW MEXICO, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON BEHALF OF THIRTY-SIX STATES AS AMICUS CURIAE FOR THE STATE OF NEW MEXICO

GERALD B. RICHARDSON
Assistant Attorney General
Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

CHARLES A. GRADDICK
Attorney General of Alabama

WILSON L. CONDON
Attorney General of Alaska

ROBERT K. CORBIN
Attorney General of Arizona

JOHN STEVEN CLARK
Attorney General of Arkansas

(Cont. inside cover)

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

(Cont. from front cover)

GEORGE DEUKMEJIAN
Attorney General of California

JIM SMITH
Attorney General of Florida

DAVID H. LEROY
Attorney General of Idaho

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM GUSTE
Attorney General of Louisiana

STEPHEN H. SACHS
Attorney General of Maryland

FRANK J. KELLEY
Attorney General of Michigan

JOHN ASHCROFT
Attorney General of Missouri

RICHARD H. BRYAN
Attorney General of Nevada

ROBERT O. WEFALD
Attorney General of North Dakota

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

LeROY S. ZIMMERMAN
Attorney General of Pennsylvania

MARK V. MEIERHENRY
Attorney General of South Dakota

DAVID L. WILKINSON
Attorney General of Utah

MARSHALL COLEMAN
Attorney General of Virginia

CHAUNCEY H. BROWNING
Attorney General of West Virginia

J. D. MacFARLANE
Attorney General of Colorado

ARTHUR K. BOLTON
Attorney General of Georgia

TYRONE C. FAHNER
Attorney General of Illinois

THOMAS J. MILLER
Attorney General of Iowa

JAMES E. TIERNEY
Attorney General of Maine

FRANCIS X. BELLOTTI
Attorney General of Massachusetts

WARREN SPANNAUS
Attorney General of Minnesota

MIKE GREELY
Attorney General of Montana

ROBERT ABRAMS
Attorney General of New York

WILLIAM J. BROWN
Attorney General of Ohio

DAVE FROHNMAYER
Attorney General of Oregon

DANIEL R. McLEOD
Attorney General of South Carolina

MARK WHITE
Attorney General of Texas

JOHN J. EASTON, JR.
Attorney General of Vermont

KENNETH O. EIKENBERRY
Attorney General of Washington

STEVEN F. FREUDENTHAL
Attorney General of Wyoming

QUESTIONS PRESENTED

1. Whether three private corporate contractors performing contracts for the United States Atomic Energy Commission ("AEC") and its successors are subject to the New Mexico gross receipts and compensating taxes (§§72-16A-1, *et seq.*, N.M.S.A. 1953) on funds received under their contracts to pay salaries and related costs of their own employees, their own award fees, and obligations to third party suppliers from whom they have ordered in their own names.

2. Whether reliance by three private corporate contractors on an "advanced funding" arrangement pursuant to 41 U.S.C. §255, §4(c)(2) of the Atomic Energy Act of 1946, now codified at 42 U.S.C. §2061(b), and 31 C.F.R. Part 205 (1976), to finance their performance of contract work for the Atomic Energy Commission, renders such contractors federal agents exempt from the New Mexico gross receipts tax, where the funds are used to meet the contractors' obligations, not those of the federal government.

3. Whether, in the absence of Congressional authorization, agency-creating clauses inserted in contracts with three private corporate contractors performing work for the Atomic Energy Commission, insulate them from the New Mexico gross receipts and compensating taxes.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE. 1

ARGUMENT

I. Unless specifically forbidden by Congress, the states should be free to levy non-discriminatory taxes on federal contractors. 2

II. *Kern-Limerick, Inc. v. Scurlock* requires affirmative designation of contractors as federal agents in order to insulate them from state taxes 4

CONCLUSION. 8

TABLE OF AUTHORITIES

Cases:

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 3

Graves v. New York, 306 U.S. 466 4

James v. Dravo Contracting Company, 302 U.S. 134 . . . 3

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 . . . 2, 3, 4, 5, 6

Livingston v. United States, 364 U.S. 281, *aff'g.* 179 F.Supp. 9. 5

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 . . . 2, 3, 4

United States v. Boyd, 378 U.S. 39, *aff'g.* 211 Tenn. 139, 363 S.W.2d 193 5

United States v. County of Fresno, 429 U.S. 452. 3

United States v. Nevada Tax Commission, 291 F.Supp. 530, *aff'd.* 439 F.2d 435 5

No. 80-702

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA, *Petitioner,*

v.

STATE OF NEW MEXICO, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON BEHALF OF THIRTY-SIX STATES AS AMICUS CURIAE FOR THE STATE OF NEW MEXICO

INTEREST OF THE AMICUS CURIAE

Private corporations under contract to federal agencies, including the Atomic Energy Commission and its successors, perform their work in virtually every state of the country. Litigation challenging the right of the individual states to levy a variety of taxes on such contractors has arisen in virtually every state as well. The determination in the present case will have repercussions on each state's revenues and tax structures. More importantly, it may avoid future litigation by defining

the reach of the taxing authority of the states and the scope of the federal government's power to insulate private corporations from state taxes.

In the present case, the United States argues that all contractors utilizing advanced funding arrangements for their financing are federal agents, rather than identifying special contract provisions or circumstances which render particular Atomic Energy Commission contractors agents, U.S. Brief, 28, 33. This is a broad incursion on the general right of states to levy non-discriminatory taxes on federal contractors, in purported compliance with the narrow exception enunciated in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954). The attempts of federal contracting officials to insert agency-creating clauses in the contracts at issue here further necessitate a reconsideration of the validity of the *Kern-Limerick* holding. These, too, are issues impinging directly on each state.

Amicus curiae adopt the presentation of the opinion below, the statutes involved, and the statement of the case, contained in the brief of the State of New Mexico.

ARGUMENT

I. UNLESS SPECIFICALLY FORBIDDEN BY CONGRESS, THE STATES SHOULD BE FREE TO LEVY NON-DISCRIMINATORY TAXES ON FEDERAL CONTRACTORS.

In the seminal case of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court recognized that its blanket prohibition of state taxation of federal activities might

> not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens

> of Maryland may hold in this institution, in common with other property of the same description throughout the State.
>
> *Id.*, at 436.

Thus, the validity of non-discriminatory taxes on federal activities and instrumentalities was affirmed even in the case which barred virtually all state taxation of such activities. The validity of non-discriminatory taxes was at the heart of this Court's decision in *James v. Dravo Contracting Company*, 302 U.S. 134 (1937), in which the prohibitions of *M'Culloch v. Maryland* were essentially swept away in regard to federal contractors. The validity of non-discriminatory state taxation of those working for the federal government was again highlighted in *United States v. County of Fresno*, 429 U.S. 452 (1977), where this Court approved the above quote from *M'Culloch v. Maryland*, 429 U.S. at 459, noting that

> "[f]or many years the Court read the decision in M'Culloch as forbidding taxes on those who had contractual relationships with the Federal Government. . . In later years, however, the Court departed from this interpretation of M'Culloch,
>
> *Id.*, at 460.

Thus, this Court has come close to adopting the observation that

> One could, and perhaps should, read M'Culloch . . . simply for the principle that the Constitution prohibits a state from taxing discriminatorily a federally established instrumentality,
>
> *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 350 (1968) (Marshall, J., dissenting).

This Court's decision in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), cannot be reconciled with the cited line of cases. It permits the Executive Branch to unilaterally insulate

itself from the economic burden of a non-discriminatory state tax whose legal incidence falls on a federal contractor. Furthermore, *Kern-Limerick* reads into the general power of executive agencies to contract, a Congressional intent that such contracts may insulate the contractors from state taxes. In reality, Congress has been silent in this regard. As this Court has held,

> It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. . . but there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities.
>
> *Graves v. New York*, 306 U.S. 366, 479-480 (1939).

The judiciary must be ever vigilant to protect the United States from discriminatory taxation which invades its supremacy by denying equal protection to its contractors. However, we urge that this Court reconsider *Kern-Limerick, Inc. v. Scurlock* and hold that, absent an affirmative showing of Congressional intent to insulate private contractors, they are liable for non-discriminatory state taxes.

II. *KERN-LIMERICK, INC. v. SCURLOCK* REQUIRES AFFIRMATIVE DESIGNATION OF CONTRACTORS AS FEDERAL AGENTS IN ORDER TO INSULATE THEM FROM STATE TAXES.

In the present case, the United States contends that these three contractors are agents not by virtue of specific authorizations but by virtue of their reliance on an advanced funding arrangement, U.S. Brief, 28, 33. Since the Atomic Energy Commission has over 160 other contractors financed through the same arrangement, the United States' contention is not that

these three contractors are uniquely entitled to exemption but that all of its large contractors are insulated, R.VI, McGrath depo. 9. Even if this Court recognizes the continuing validity of *Kern-Limerick, Inc. v. Scurlock, supra,* the United States cannot prevail. *Kern-Limerick* could not be clearer in requiring express, affirmative designation of particular contractors. Here, the United States argues for blanket immunization of all large Atomic Energy Commission contractors. This is a complete distortion of *Kern-Limerick* and should be rejected.

The voluminous discovery conducted by the State of New Mexico compellingly illustrates that advanced funding is not unique to the Atomic Energy Commission, has never been regarded as an agency-creating device within the Atomic Energy Commission, and in its operation does not bind the United States to third parties, N.M. Brief, 24-29. Had this factual development occurred in *Livingston v. United States,* 364 U.S. 281 (1960), *aff'g,* 179 F.Supp. 9 (E.D.S.C. 1959), *United States v. Nevada Tax Commission,* 291 F.Supp. 530 (D. Nev. 1968), *aff'd,* 439 F.2d 435 (9th Cir. 1971), and the sales tax portion of *United States v. Boyd,* 211 Tenn. 139, 363 S.W.2d 193 (1962), *aff'd on another issue,* 378 U.S. 39 (1964), the decisions in those cases might well have been in favor of the state taxing authorities. In addition, the record in the present case indicates that the Atomic Energy Commission does not regard its management contractors as agents absent express authorization, N.M. Brief, 20-23. In the present case, even the July 1, 1977, contract amendments do not amount to an express authorization but rather a series of legal arguments, J.A. 64.

The drafting of these contract amendments evidences the cynicism of the Executive Branch in regard to insulating its contractors. Its interpretation of *Kern-Limerick* as a license to insert the barest minimum of supposedly operative phrases,

while preserving a non-agent status in all areas apart from taxation, could not be clearer. Even more disturbing is the discussion in New Mexico's brief concerning the Department of Defense which, in presentations to Congress, repudiated the *Kern-Limerick* holding but continued to argue its impact in court after court thereafter, N.M. Brief, 43-44. Eliminating immunity for federal contractors absent explicit Congressional authorization will end the Executive Branch's dubious role as guardian of the federal-state balance in taxation.

Reaffirming the application of non-discriminatory taxes to federal contractors will not produce a massive drain on the federal treasury. Only seven states have a tax on the gross receipts of contractors rendering services which is equivalent to New Mexico's gross receipts tax.[1] In these states, constituting a contractor as an agent would presumably bar taxation of its receipts. Contractors in all other states would be unaffected by an agency designation since their receipts are not taxed anyway.

Although there would be a somewhat greater effect with regard to taxation of suppliers selling property to federal contractors, nonetheless, more than half of all states would immunize or tax these transactions regardless of the agency designation. In sixteen states, constituting a contractor as an agent would not change its tax burden in regard to such purchases, either because these states do not have a sales or comparable tax,[2] because sales to federal contractors are

---

[1] Arizona; Ariz. Rev. Stat. Ann. §§42-1309, 42-1361 and 42-1371; Mississippi (as to construction only), Miss. Code Ann. §27-65-21, M.C.A. 1972; South Dakota, S.D. Comp. Laws Ann. §10-45 *et seq.*; Virginia, Va. Code §58-441.1 *et seq.*; Washington, Wash. Rev. Code Ann. §82.04.010 *et seq.*; West Virginia, W.Va. Code §11-13-2 *et seq.*; Delaware, Del. Code Ann., tit. 30, §2501 *et seq.*

[2] Alaska, Montana, New Hampshire and Oregon.

exempt even if they are not agents,[3] because sales of tangible personal property are exempt if resold to the United States,[4] because a claim for refund of tax paid by the federal contractor may be made by the United States[5] or because they place the legal incidence on the seller and have no statutory exemption for transactions with the federal government or its agents.[6]

Additionally, fifteen states would immunize the sale of at least some types of tangible personal property to federal contractors pursuant to statutory exemptions applicable to sales of goods which are subsequently resold.[7]

---

[3] Hawaii, Hawaii Rev. Stat. R.S. §237-26; Kansas, Kansas Stat. Ann. §79-3606(e) (1980 Supp.); Nevada, Nev. Rev. Stat. §§372.390, 372.345; New Jersey, N.J. Stat. Ann. §54:32 B-9; New York (as to tangible personal property incorporated into a building or structure owned by the United States), N.Y. Tax Law §§1115(15), 1115(16) (Consol.); Ohio (as to building or construction materials incorporated into a structure built under contract with the United States), Ohio Rev. Code Ann. §§5739.01, 5739.02; Florida, Department of Revenue Rule 12A-1.51(7), Florida Administrative Code.

[4] Texas, Tex. S. Tax Code Ann. §20.04 (Vernon); Nebraska, Neb. Rev. Stat. §77-2704(1)(a) R.S. Supp., 1980.

[5] North Carolina, Dept. of Revenue Sales Tax Regulation 42.

[6] South Carolina, S.C. Code §12-35-510; and California (as to leases of tangible personal property to the United States), West's Ann. Rev. and T. Code §6381.

[7] Arizona (as to construction materials), Ariz. Rev. Stat. Ann. §42-1321 A(3); Arkansas, Ark. Stat. Ann. §84-1904(5); Colorado (as to construction materials), Colo. Rev. Stat. §39-26-114(XIX); Georgia, Ga. Code Ann. §91A-4501(f)(1); Indiana (as to materials for manufacturing), Ind. Code §§6-2.55-5, 6-2.55-6; Maine (as to tangible personal property used in research and development and as to machinery and equipment used in manufacturing), Me. Rev. Stat. Ann. 36 §§1760(31), 1760(32); Massachusetts (as to construction materials used in government construction contracts), Mass. Gen. Laws Ann. Ch. 64 H§6(f); Michigan, Mich. Comp. Laws

(Cont. p. 8)

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

GERALD B. RICHARDSON
Assistant Attorney General
Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

CHARLES A. GRADDICK
Attorney General of Alabama

WILSON L. CONDON
Attorney General of Alaska

ROBERT K. CORBIN
Attorney General of Arizona

JOHN STEVEN CLARK
Attorney General of Arkansas

GEORGE DEUKMEJIAN
Attorney General of California

J. D. MacFARLANE
Attorney General of Colorado

JIM SMITH
Attorney General of Florida

ARTHUR K. BOLTON
Attorney General of Georgia

DAVID H. LEROY
Attorney General of Idaho

TYRONE C. FAHNER
Attorney General of Illinois

LINLEY E. PEARSON
Attorney General of Indiana

THOMAS J. MILLER
Attorney General of Iowa

(Cont. p. 9)

---

[7] (Cont. from p. 7)
§205.51; Missouri (as to materials for manufacturing), Mo. Ann. Stat. §144.030(6); Oklahoma, Okla. Stat. Ann. tit. 68 §1305(o); Pennsylvania, Pa. Stat. Ann. tit. 72 §7204 (Purdon); Tennessee (as to materials for manufacturing), Tenn. Code Ann. §67-3004; Utah (only retail sales are taxed, not wholesale sales), Utah Code Ann. §59-15-4; Vermont (as to materials for manufacturing), Vt. Stat. Ann. tit. 32 §§9701, 9741; Virginia, Va. Code §58.441.6.

WILLIAM GUSTE
Attorney General of Louisiana

STEPHEN H. SACHS
Attorney General of Maryland

FRANK J. KELLEY
Attorney General of Michigan

JOHN ASHCROFT
Attorney General of Missouri

RICHARD H. BRYAN
Attorney General of Nevada

ROBERT O. WEFALD
Attorney General of North Dakota

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

LeROY S. ZIMMERMAN
Attorney General of Pennsylvania

MARK V. MEIERHENRY
Attorney General of South Dakota

DAVID L. WILKINSON
Attorney General of Utah

MARSHALL COLEMAN
Attorney General of Virginia

CHAUNCEY H. BROWNING
Attorney General of West Virginia

JAMES E. TIERNEY
Attorney General of Maine

FRANCIS X. BELLOTTI
Attorney General of Massachusetts

WARREN SPANNAUS
Attorney General of Minnesota

MIKE GREELY
Attorney General of Montana

ROBERT ABRAMS
Attorney General of New York

WILLIAM J. BROWN
Attorney General of Ohio

DAVE FROHNMAYER
Attorney General of Oregon

DANIEL R. McLEOD
Attorney General of South Carolina

MARK WHITE
Attorney General of Texas

JOHN J. EASTON, JR.
Attorney General of Vermont

KENNETH O. EIKENBERRY
Attorney General of Washington

STEVEN F. FREUDENTHAL
Attorney General of Wyoming

September, 1981